No. 89-1167

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In The
Supreme Court of the United States
October Term, 1990

ROBERT L. BRUTSCHE, M.D., Petitioner,

v.

LINDA CLEVELAND-PERDUE, Successor Representative and Administratrix of the Estate of Joseph Jones, Jr. (a/k/a Roscoe Simmons), Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Ronald E. Elberger, Esq.
BOSE McKINNEY & EVANS
2700 First Indiana Plaza
135 North Pennsylvania Street
Indianapolis, Indiana 46204
(317) 684-5000

Counsel of Record for Petitioner

Stephen E. Arthur, Esq.
George T. Patton, Esq.
BOSE McKINNEY & EVANS
2700 First Indiana Plaza
135 North Pennsylvania Street
Indianapolis, Indiana 46204
(317) 684-5000

Counsel for Petitioner

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Petitioner, Robert L. Brutsche, M.D., pursuant to Rule 15.7, Rules of the United States Supreme Court, submits this supplemental brief in response to the Brief for the United States as Amicus Curiae.

While agreeing that Dr. Brutsche's conduct in this case did not rise to the level of "deliberate indifference" required to establish an eighth amendment violation, the facts of this case being distinguishable from the facts of *Newman v. Alabama,* 503 F.2d 1320 (5th Cir. 1974), *cert. denied,* 421 U.S. 948 (1975); *Finney v. Arkansas Board of Corrections,* 505 F.2d 194 (8th Cir. 1974); and *Bishop v. Stoneman,* 508 F.2d 1224 (2d Cir. 1974), Br. for United States 13-16, the United States nonetheless recommends that the petition for writ of certiorari be denied, thereby requiring Dr. Brutsche to confront a trial when the application of qualified immunity, which the United States otherwise agrees is appropriate, would preclude such an injustice. Moreover, even though the United States concedes that *Newman,*

Bishop, and *Finney* had merely *begun* to recognize that prison officials *generally* have a duty to provide a constitutionally adequate system for the delivery of inmate medical care, the United States noted that *none* of the cases upon which the Seventh Circuit relied focused on the particular level of responsibility of any individual prison official, or indicated, much less "clearly established," the minimum constitutional expectations for an official in Dr. Brutsche's position who was not responsible for the daily administration of inmate medical care and who had no direct authority over those (the warden, prison physicians, and prison hospital administrator) who were. Br. for United States 13-14.

The United States claims that the Seventh Circuit did not establish "an improper standard for determining whether, at the time of the acts in question, the governing law was clearly established," since "a right can be clearly established if there was in other courts a *sufficiently clear consensus* on the issue that the announcement of a controlling precedent was simply a question of time." Br. for United States 10 (emphasis supplied). Petitioner respectfully disagrees.

Where prior district and appellate court decisions in this very action evidence an inability among members of the judiciary to determine pre-existing law, it is untenable to require a lay public official to speculate as to a futuristic trend which might possibly result in a controlling precedent in order to ascertain "clearly established" law. The mere speculative anticipation of the possible future recognition of a constitutional right does not provide the basis for claiming that the right was clearly established.

I.

THE SEVENTH CIRCUIT'S "CLEAR TREND" TEST FOR QUALIFIED IMMUNITY CONFLICTS WITH THIS COURT'S TEST REQUIRING THE CONSTITUTIONAL RIGHT TO BE "CLEARLY ESTABLISHED"

Although the United States and Dr. Brutsche agree that the court of appeals' decision is erroneous, petitioner disagrees with the United States as to the source of the error. The government concludes that the error resulted from the incorrect application of a new, but proper standard. The error, however, arises from an unwarranted

modification, if not obfuscation, of this Court's qualified immunity standard. The Seventh Circuit's approach significantly limits, if not nullifies, qualified immunity in a manner inconsistent with *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) and *Anderson v. Creighton,* 483 U.S. 635 (1987).

The court of appeals modified and restated this Court's test for qualified immunity, applying the following standard:

> In the absence of a controlling precedent we look to all relevant caselaw in an effort to determine whether at the time of the alleged acts a *sufficient consensus* had been reached indicating the official's conduct was unlawful. To state the proposition in another way, we seek to determine whether there was such a *clear trend* in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.

Pet. App. A7 (emphasis added). The Seventh Circuit opinion states the standard in two different ways: "sufficient consensus" and "clear trend." The United States read the two statements into one "sufficiently clear consensus" test. Br. for United States 10.

The United States acknowledges that "this Court has never determined whether the law must be 'clearly established' by decisions of courts (federal or state, appellate or trial) in the same jurisdiction where the alleged unlawful events took place." Br. for United States 10. The United States argues it is appropriate to look to other jurisdictions in the absence of controlling precedent in this Court or the relevant court of appeals. Dr. Brutsche agrees provided that the law is (a) pre-existing, *Anderson,* 483 U.S. at 640 ("in the light of pre-existing law the unlawfulness [of an official's conduct] must be apparent"); (b) clearly established, *Harlow,* 457 U.S. at 818 (public official entitled to immunity unless actions violated "clearly established statutory or constitutional law of which a reasonable person would have known"); (c) particularized, *Anderson,* 483 U.S. at 640 ("contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right"); and (d) "fact-specific," with a considerable degree of factual specificity so that an official can know whether his own conduct is unlawful, *id.* at 639-41. Br. for United States 9.

The Seventh Circuit's "sufficient consensus" or "clear trend" approach, as well as the United States' modified "sufficiently clear consensus" reading of the Seventh Circuit's approach, all suffer from one major flaw — they introduce the question of degree. How many cases are "sufficient" to constitute a consensus? When do a few scattered decisions become a trend? When do they become a clear trend? The strength of *Harlow* is that it drew a bright line: clearly established law. Allowing words of degree will impermissibly limit, if not negate, qualified immunity.[1]

The Seventh Circuit, in its opinion, used language from both the "sufficient consensus" test and the "clear trend" test. In application, however, the lower court used the latter test as indicated by the language in and holding of the Seventh Circuit's opinion. First, the court of appeals explicitly referred to a trend in the case law. The lower court stated:

> The trend established by *Newman, Finney* and *Stoneman,* has been followed by several other circuits. *See Inmates of Allegheny City Jail v. Pierce,* 612 F.2d 754 (3d Cir. 1979); *Hoptowit v. Ray,* 682 F.2d 1237 (9th Cir. 1982); *Ramos v. Lamm,* 639 F.2d 559 (10th Cir. 1980), *cert. den.,* 450 U.S. 1041 (1981); *Anderson v. City of Atlanta,* 778 F.2d 678, 686 at n.12 (11th Cir. 1985).

Pet. App. A8 n.5. The lower court had previously referred to its own circuit's opinion, *Wellman v. Faulkner,* 715 F.2d 269 (7th Cir. 1983), *cert. denied,* 468 U.S. 1217 (1984), as part of the trend. Pet. App. A7. Obviously, the Seventh Circuit conveniently seized upon *post-1979* decisions to justify its finding that there was clearly established law in 1975. The clear trend or sufficient consensus the Seventh Circuit specifically cited and relied upon to deny Dr. Brutsche immunity

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1 Use of the word "consensus" is less susceptible to varying interpretations. The dictionary defines the word to mean general agreement, unanimity, accord; collective opinion or judgment arrived at by most of those concerned. Websters Third Unabridged New International Dictionary 482 (1971). A consensus differs from a sufficient consensus or a clear trend.

did not develop until four years *after* the alleged unlawful acts.

Second, the proof that the Seventh Circuit applied the "clear trend" test is the result reached. The lower court concluded that the relevant case law amounted to a "sufficient consensus" even though both petitioner and amicus curiae agree that the case law did not amount to "clearly established" law under *Harlow* and *Anderson.* The Seventh Circuit's finding of a "sufficient consensus" or "clear trend" demonstrates how easily a court can look to future case law developments and then second-guess the public official. Hindsight was the Seventh Circuit's basis for denying qualified immunity, but cannot be allowed to sound the death knell to the doctrine.

With the benefit of the case law subsequent to *Finney, Bishop,* and *Newman,* the Seventh Circuit ruled that Dr. Brutsche should have known in 1975 that the constitutional right was "clearly established." When Dr. Brutsche was making his decisions in 1975, he did not have the benefit of knowing what the progeny of *Newman, Finney,* and *Bishop* would be. Furthermore, he did not know whether the nascent trend exemplified by the three factually distinguishable, if not inapplicable, cases was an inexorable development of the law, or one that would be reversed, modified, or remain constant. Only with hindsight could the Seventh Circuit know that *Newman, Finney,* and *Bishop* started a trend, that the trend would be affirmed, and that the trend would not change course. However, an "official cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette,* 434 U.S. 555, 562 (1978).

The Seventh Circuit's approach impermissibly allows judges to deny qualified immunity even though the law is not "clearly established." In this very action, prior district and appellate court decisions relied upon totally different "clearly established" law. The district judge himself, after reviewing the facts of this case on three separate occasions, admitted that he had difficultly adjudicating the limits of liability:

> Another one of the many difficulties this Court has had with this case is that there is virtually no law granting qualified immunity to a defendant in a medical case/prison context. In other words, many cases have found defendants liable, thereby

> setting a liability floor, but none have set a ceiling by which this Court can judge the limits of the liability.
>
> * * *
>
> Whether this Court would have found a reasonable official in Brutsche's shoes would have known that the "contours of the right" were clearly established as to him simply as a result of *Thomas v. Pate,* [493 F.2d 151 (7th Cir. 1974), *vacated,* 419 U.S. 813, *cert. denied,* 419 U.S. 879] is questionable; however, the gloss put on *Thomas* by *Joseph [v. Brierton,* 739 F.2d 1244 (7th Cir. 1984),] and *Bass [v. Wallenstein,* 769 F.2d 1173 (7th Cir. 1985),] has convinced the Court that it would be "splitting hairs" to distinguish Brutsche's situation from *Thomas.*

Pet. App. B18, B20. The Seventh Circuit held that *Thomas, Joseph,* and *Bass* did not clearly establish that Dr. Brutsche's conduct constituted systemic indifference to an inmate's medical needs, relying instead upon the clear trend beginning with *Newman, Finney,* and *Bishop.* Pet. App. A7. If both district and appellate judges reviewing this case have demonstrated an inability to ascertain what law was clearly established, then surely a public official in Dr. Brutsche's position could not be expected to do so fifteen years ago.

Public employees should not be required to speculate as to what constitutes a clear trend in the law which might result in the recognition of a constitutional right or analyze the future gloss that one case might put on another. Stripping government officials of qualified immunity when they act in an unsettled area of the law is inconsistent with the policy behind qualified immunity. The doctrine should protect government officials who do not violate "clearly established," pre-existing law.

The Seventh Circuit improperly modified this Court's standard on qualified immunity. The adoption and application of this improper standard is of sufficient import to public officials across the nation to merit this Court's consideration.

II.

THE UNITED STATES AGREES WITH DR. BRUTSCHE THAT THE SEVENTH CIRCUIT ERRED IN DENYING HIM QUALIFIED IMMUNITY UNDER THIS COURT'S DECISIONS

Dr. Brutsche supervised the health care of 20,000 inmates at over 30 penal institutions as Medical Director of the Federal Bureau of Prisons. No reasonable official in that position could read the trilogy of cases offered up by the Seventh Circuit and clearly know how to mold his conduct in order to avoid liability. The court of appeals found a clear trend recognizing that systemic deficiencies could constitute deliberate indifference of an inmate's medical needs, citing *Newman v. Alabama,* 503 F.2d 1320 (5th Cir. 1974), *cert. denied.* 421 U.S. 948 (1975); *Bishop v. Stoneman,* 508 F.2d 1224 (2d Cir. 1974); *Finney v. Arkansas Board of Corrections,* 505 F.2d 194 (8th Cir. 1974). Yet, as the government persuasively argues, these cases are inapposite. Br. for United States 13-16.

In this case, Dr. Brutsche reasonably attempted to address a problem in a federal penitentiary. The United States notes, "To the extent the conditions [in the Terre Haute penitentiary] are a result of a scarcity of resources or of competent personnel, singling out an individual as a scapegoat for those systemic problems is wholly inappropriate." Br. for United States 18. Dr. Brutsche should not be personally liable; he should be immune from trial and civil damages.

Finally, the United States argues that "the courts below have not considered all the issues that this case presents," Br. for United States 8, and that "certain aspects of the case remain to be fully explored and may shed further light on the issues." Br. for United States 18. The government never specifies what issues have not been considered or what aspects need to be more fully explored. Frankly, Dr. Brutsche does not know what the United States is referring to and therefore respectfully disagrees.

Exhaustive discovery has been completed since this Court remanded the matter back to the district court in 1980, approximately ten years ago. Depositions of every witness in the case are in the record. A trial will not disclose any additional facts relevant to the issue of qualified immunity. Furthermore, since one of the fundamental

purposes of qualified immunity is to shield public officials from trial, such purpose will be defeated. Dr. Brutsche may also be collaterally estopped from making additional arguments at trial on the defense of qualified immunity. The district judge previously denied petitioner's "assertion of qualified immunity *as a defense*." Pet. App. Dll (emphasis added). Such a ruling indicates the district court will not reconsider the issue of qualified immunity at trial.

III.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Ronald E. Elberger

BOSE McKINNEY & EVANS
2700 First Indiana Plaza
135 North Pennsylvania Street
Indianapolis, Indiana 46204
(317) 684-5000

Counsel of Record

Stephen E. Arthur
George T. Patton, Jr.

BOSE McKINNEY & EVANS
2700 First Indiana Plaza
135 North Pennsylvania Street
Indianapolis, Indiana 46204
(317) 684-5000

Counsel for Petitioner

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